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No. 1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

CHARLES W. JAMIESON,

Appellant,

vs.

MARION B. FOLSOM now ANTHONY J. CELEBREEZE SECRETARY OF HEALTH, EDUCATION and WELFARE,

Appellee.

On Appeal from the United States Court of Appeals Seventh Circuit

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JURISDICTIONAL STATEMENT.

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Appellee.

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JURISDICTIONAL STATEMENT PURSUANT TO RULE 15 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

Appellant's appeal from the judgment of the United States Court of Appeals of the Seventh Circuit entered January 11, 1963 affirming the order of the United States District Court of the Northern District of Illinois, Eastern Division submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question affecting all Social Security beneficiaries under the age of seventy-two years of age is presented.

OPINION BELOW.

The interlocutory order and memorandum of the said District Court is reported in 170 F. Supp. 858 (862). The so-called final order of said court is hereto attached bearing a date of April 11, 1962 together with the order of the United States Court of Appeals supporting said order of the trial court, under date of January 11, 1963.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

This appeal is taken as a matter of right by Sec. 1009 of Title 5 of the United States Code, particularly Sec. 1009(a) as by the evasion, avoidance, ignoring and treating with contempt Sec. 404.512(b) of the Social Security Regulations under Title 42 of said code, the Secretary of Health, Education and Welfare, the trial court and the United States Court of Appeals have averred and held unconstitutional an Act of Congress *viz.* Sec. 404.512(b) of Regulations pertaining to the Social Security Code under Title 42 as well as Sec. 1009 and Sec. 1252 also Sec. 2101(c) of Title 28. Said Secs. 1009 and 1009(a) being under Title 5 of said Code.

QUESTIONS PRESENTED.

1. When it is shown to a court that a case involves forgery of plaintiff's name does not such a statement set forth cause for action by the court?

2. When it is demonstrated that *fraud* has been perpetrated upon the court, does not such proven statement set forth cause for action by said trial court. That same court being victimized by presentations to that court?

3. Where it is stated that the defendant violated sections of the Code and Regulations of the United States

should not that said court be alerted to the protection of said Code and Regulations?

4. Where, despite the urging of the defendant, the plaintiff has shown that said court had continuing jurisdiction of this cause, should the plaintiff have been denied vital rights by said court's dismissal of the cause?

5. Where it had been urged upon the trial court that the plaintiff had been rendered unconscious and so stricken by overnight illness that plaintiff could not attend court nor be represented, is it incumbent upon the trial court to attend such dire penalty as the dismissal of plaintiff's cause with prejudice and forbidding reinstatement or rehearing?

The question further presented is whether the Secretary can despoil a Social Security beneficiary of that which is due and owing by making said beneficiary appear as overpaid through a showing of figures and calculations based on beneficiary's gross pay instead of his net or "take home" pay as dictated by Sec. 404.512(b) of the S. S. Code Title 42 and by not permitting evidence in possession of the Secretary of the U. S. Treasury to prove that forgery of beneficiary's endorsement had been committed, also to the detriment of appellant.

STATUTES AND CODE INVOLVED.

Ill. Rev. Stat. 1941, Chap. 51, Sec. 1 of par. or sec. 50; Constitution of Ill. Art. II Sec. 2; Constitution of the U. S. Amendment XIV Sec. 1 second sentence; Title 5 U. S. Code Secs. 1005(a); 1005(d), 1009 verbatim, 1009(a) verbatim; Secs. 1001 to 1101(a)(1)(3) particularly 1001(c), (d) and (f); 1005(a) (b), (c) and (d); 1006(a); 1007(a) and (b); 1008(a); 1009(a) including (e) and 1101(a)(1)(3); Title 28 Sec. 1731 verbatim; Sec. 1732; Title 42 Sec. 405(g); Sec. 404.512 and Sec. 404.512(b) of Regulations under Title 42 of said Code.

THE CASE.

This action is brought upon the premise that in the Supreme Court of the United States the lawyer is addressing a tribunal that, individually and collectively, is seeking to do substantial justice, this appellant would bring to the attention of this court violations of Sec. 404.512(b) of Regulations under the Social Security Code, Title 42 which, in effect, rises to Administrative Officers and the lower courts deeming unconstitutional an Act of Congress.

THE FACTS.

In the latter part of February 1956 appellant wrote his Social Security Local Bureau that he had not received his benefit check for January. Said Bureau replied, in effect, that appellant had nothing coming as he had been overpaid in 1955 and was being penalized therefor. Appellant answered the above statement by writing, in effect, prove it. Said Bureau sent figures and calculations which appellant had to reject.

Appellant was next sent before a Referee of the Appeals Council of the Secretary of Health, Education and Welfare who, in his opening statement said he reserved the right to delete from the ensuing hearing anything which he deemed impertinent; resultantly, he did just that, deleting almost everything from his report which was vital to appellant's cause. After several hours of harangue the Referee closed the hearing in anger.

Pursuant to Referee's report to the Appeals Council, it held with the Local Bureau in every detail in report C-2418. Appellant's request for a review of the Referee's report by the Appeals Council was denied by said body.

Appellant was forced to appeal to the District Court under case 58-C-725. The District Court, at the first hear-

ing rejected the report submitted by the Appeals Council as arbitrary and capricious and sent the case back to the Secretary under reversal and remandment, taking particular exception to the figures and calculations submitted by said Referee and, by this unappealable, interlocutory Memorandum and Order, directed the Secretary to hold a "further hearing consistent with the views herein expressed". 170 F. Supp. 858 (862) *Jamieson* v. *Folsom*.

Appellant ultimately pursuant to the above unappealable, interlocutory order of the trial court, went before a Hearing Officer (he is termed a Hearing Officer rather than the former name Referee). A protracted hearing was closed in anger upon the part of the Hearing Officer who had displayed bias and umbrage throughout the hearing because the appellant had brought a reporter with him to hearing.

Appellant petitioned the court to have the second report of the Appeals Council reviewed as the Secretary had not had the figures and calculations first used revamped in accordance with the dictates of Sec. 404.512(b) of Regulations attached to the S. S. Code Title 42, nor the directions of the interlocutory order of March 11, 1959. So, in that very important detail the order of March 11, 1959 is still pending. Appellant's petition was denied by the trial court.

Three, several times since the interlocutory order of March 11, 1959, have there been formal, scheduled sessions of the trial court in which the Secretary defaulted in appearance. At the first of said sessions when the appellant prayed the court for an order of default the court vociferously displaying irritation and annoyance, denied appellant's prayer. At two later formal scheduled hearings when the defendant defaulted in appearance, the court denied appellant an order of default.

Despite the fact that appellant has shown vital need for judicial adjustment because of appellee's non-compliance with the trial court's orders, appellant has been denied just and proper consideration by being cut down through a dismissal of his cause with prejudice.

Appellant appealed to the United States Court of Appeals under case 13798, in expectation that the latter court would recognize the fact that the trial court's order was still pending because of the Secretary's non-compliance with Sec. 404.512(b) of Regulations under the Social Security Code, Title 42.

The United States Court of Appeals has not recognized the fact that as to compliance with Sec. 404.512(b) of Title 42 of the Code, the Memorandum and Order issued by the trial court March 11, 1959 is still pending as an interlocutory, non-appealable order, the United States Court of Appeals resort to technicalities notwithstanding.

Wherefore, this appeal deemed warranted by this oversight upon the part of the United States Court of Appeals, which is vital to appellant's cause and the relief sought.

ARGUMENT.

This action is forced upon appellant by the perverse position taken by the Secretary and his aides, as well as that taken by the lower courts, as against the provisions of Sec. 405 of Title 42 and, more particularly Sec. 404.512(b) of Regulations under the S. S. part of said Code.

All figures and calculations used and results arrived at were based upon appellant's *gross* pay instead of his net or "take home" pay as quoted in the above Sec. 404.512(b).

With reference to figures and calculations erroneously compiled and contrary to the instructions of the Code, to deny a right or acquiesce in determinations adverse to legal standards, such figures and calculations are subject to review by the courts,

American etc. v. *Civil etc.*, 178 F. 2d 903 (910).

The court said in *Gould* v. *Gould*, 245 US 151 (152-3), that taxes are assessed on *net* income. Net income means wages, pay, "take home" pay.

Amendment 14 Sec. 1 protects against arbitrary or capricious legislation.

Title 28 U. S. Code Rule 41(b). In an action by the court, the court, as trier of the facts may then determine them and render judgment against the plaintiff or, may decline to render any judgment until the close of all evidence.

The administrative interpretation of administrative regulations is controlling unless it is plainly erroneous or inconsistent with the Regulations. Sec. 404.512(b), still not followed in this case.

Bowles v. *Seminole etc.*, 325 US 410.

Sec. 405(g) of Title 42 has not been comprehended by the Secretary and therefore, in error, has put said section forward. The district court must not abdicate its conventional judicial function in this case where Secretary has been chargeable with error.

Bostwick v. *Folsom*, 157 Supp. 108.

Administrative agency's findings based on judgment and prediction as well as facts are not subject to re-examination by the court unless they were not arrived at in accordance with legal standards.

Securities etc. v. *Central*, 338 US 96,
Securities etc. v. *Chenery*, 332 US 194,
American etc. v. *Civil etc.*, 178 F. 2d 903.

The Memorandum and Order entered March 11, 1959 in the trial court was not a final and appealable decree but an interlocutory, unappealable order wherein the trial court expected the Secretary to make a further report to the trial court after there had been that "further hearing" between the plaintiff-appellant and the Secretary. This report was never complete nor made complete in compliance with the order of March 11, 1959, as the figures and calculations in question were never revamped to comply with Sec. 404.512(b) of the Secretary's Regulations under Title 42 of the Code. Time for filing further pleadings.

U. S. v. *Pan etc.*, 299 F. 2d 74.

An objective of the Administrative Procedure Act was to extend right of judicial review and to enlarge authority of the courts to check illegal and arbitrary administrative action.

Title 5, Secs. 10 and 1009,
American etc. v. *Federal etc.*, 112 F. Supp. 340.

In reviewing the decision of the Referee, the Court must not abdicate its judicial function.

Our courts are quick to quash arbitrary methods of procedure.

Fuller v. *Folsom*, 155 F. Supp. 348 (349).

The then U. S. Attorney succeeded in persuading the trial court by an unsupported statement that the court's Memorandum and Order of March 11, 1959 was a final and appealable order and not an interlocutory, unappealable order; that the trial court had no further jurisdiction of the Secretary and Appeals Council because they were far away; this despite Sec. 1009 of the A. P. Act. Title 5 of the Code, particularly Secs. 1009(a) and 1009(e) part of which the trial court quoted in his said interlocutory order of March 11, 1959 which is still pending.

To the present the opposition has continued to evade the issue of compliance with Sec. 404.512(b) of Regulations under Title 42 of the Code. By the order of the trial court, the opposition should not concern itself about appellant's pay for the year 1955 and the year 1956 but only the first six months of each of said years. Said Appeals Council has not read Sec. 405(g) of Title 42 of the Code with understanding nor did said Council's decision of March 31, 1960 touch upon said Sec. 404.512(b).

Said S. S Local Bureau advised appellant that although appellant was not entitled to benefits for the first five months of 1956 appellant was entitled to benefits for the last five months of 1956 and attempted payments which were rejected because of the unsoundness of the statement and, to avoid entrapment and possible estoppel in a pending proceeding.

On three several occasions when there were formal hearings scheduled before the trial court the opposition did not

appear and appellant prayed for orders of default and judgment for appellant on those counts only to have the trial court deny appellant such right contrary to Rule 55(b)(2) of Title 5. When the defense defaults in appearance three times showing thereby no defense, error should be confessed and finding had for the plaintiff.

County etc. v. *Van Duzer,* 371 Ill. App. 112 (116).

Even in correspondence between Park M. Banta, Gen'l Counsel for the S. S. Administration and George C. Doub, Asst. Atty. Genl., the mention of Sec. 404.512(b) of Regulations under Title 42 of the Code though brought forth by appellant, said cital section was avoided.

During the trial Rules 6(d), 15, 43(e) and 60(b) of the U. S. District Court have been violated.

Action taking place in the trial court after March 11, 1959 to which the U. S. Court of Appeals took technical exception, was brought on by the trial court not the plaintiff-appellant.

Findings of fact by an administrative officer are not conclusive.

Gottmudson v. *Cardillo,* 126 F. 2d 531.

An administrative agency may not finally determine the scope of its statutory power, that is a judicial question.

Martin v. *Federal etc.,* 73 F. Supp. 482 (489) citing *Social S. Board* v. *Nurotka,* 327 US 358 (368).

Until there has been a complete compliance with the terms of an interlocutory order said order is not appealable. The Appeals Council did not comply with and, to the present has not followed Sec. 404.512(b) of Regulations under Title 42. Thus to that extent, the order of the trial court under date of March 11, 1959 is still pending and interlocutory.

An order directing compliance with an Internal Revenue Service subpoena is interlocutory and not appealable—this is the conclusion of the court of the Seventh Circuit.

The appellant's Social S. Bureau based its calculations on appellant's *gross* pay rather than his net or "take home" pay as dictated by the Code. That doesn't excuse the Referee and the Hearing Officer who were hired media, employed to act as intermediaries, who said they were lawyers, from revamping the above calculations according to the dictates of the Sec. 404.512(b) heretofore mentioned. In error, said Referee, Hearing Officer and Appeals Council, all of them accepted the figures of the Local Bureau clerks which were rejected by the trial court in its interlocutory order of March 11, 1959 found in report 170 F. Supp. 858 (862) *Jamieson* v. *Folsom* before the court was persuaded into a change of heart by the unsupported statement of the U. S. Attorney that his order of March 11, 1959 was a final decree which statement was error.

The doctrine of judicial finality cannot be invoked here as the Secretary has not complied with the terms of the Memorandum and Order of the trial court entered March 11, 1959. This suit is capable of judicial determination when said Secretary abides by that part of the Social Security Code enacted for the guidance of that office and its aides. The trial court necessarily sharing in the present and long enduring impasse by its not having exercised its power and duty of self-correction of error.

Where motion is not disposed of either expressly or by implication, federal rule provided that running of time for taking appeal is suspended until disposition of timely motion to make additional findings of fact, Federal Rules of Civil Procedure 73(a) Title 28 of the Code.

U. S. v. *Pan etc.*, 299 F. 2d 74 (76),
Phinney v. *Houston, etc.*, 252 F. 2d 357.

District Courts' findings are not binding on Courts of Appeal.

Billington v. *Prudential, etc.*, 254 F. 2d 428 (430) citing *Galena* v. *Schofield*, 218 F. 2d 217.

The Court of Appeals is prone to liberally construe the Social Security Act in favor of the party seeking its benefits.

Lietz v. *Flemming*, 264 F .2d 311 (313) citing *Caroll* v. *S. S. Brd.*, 128 F. 2d 876.

In reviewing the decision of the Referee or Hearing Officer, the Court must not abdicate its conventional judicial function.

Fuller v. *Folsom*, 155 F. Supp. 348 (349).

The umbrage of the Hearing Officer throughout the session prohibited him from making a true, unbiased report. As to payments made to appellant, may appellant call the attention of the court to paragraph three of the third defense in the original answer of defendant in the trial.

Nor does said Appeals Council appear to comprehend the charges against the Secretary as set forth in the Memorandum and Order of March 11, 1959 wherein, among other details, the court was not interested in appellant's pay for the entire years of 1955 and 1956 as appellant has stressed since the beginning but, in the first six months only of each of said years.

The question goes to the very foundation of the action of Administrative agencies entrusted by Congress with broad control over activities. The Congress shall determine, appropriately, the standard of administrative action and, in administrative proceedings of a quasi-judicial character the property of the citizen shall be protected by the rudimentary requirements of fair play. Such a hearing

has been described as an "inexorable safeguard" if conducted according to the intent of the Congress and, if unfair, or found unfair, review by the courts of appeal is in order. Mr. Chief Justice Hughes in *Morgan* v. *U. S.*, 304 U.S. 1 (14-22).

The error of an administrative tribunal may be so flagrant as to convince a court that the hearing was not a fair one.

Yeannopoulos v. *Robinson*, 247 F. 2d 655 (657).

Whether a decree is final or interlocutory depends upon its essential purport and effect and not upon its characterization in pleadings. There can be but one final decree in a suit in equity.

Simmons etc. v. *Grier*, 68 U.S. 82 (88-9).

On petition for review of administrative order petitioner asserts that he was deprived of due process of law both by the first and second reports to the Court and said Appeals Council not only accepted erroneous calculations of petitioner's pay in the first instance but said figures were not revamped in accordance with the dictates of Sec. 404.512(b) of the Regulations under Title 42; Administrative Act Title 5, Sec. 1009.

Alves v. *Shaughnessy*, 107 F. Supp. 443 (444).

The action taken by the Secretary was, in the Order and Memorandum of March 11, 1959 deemed capricious and arbitrary and was therefore unlawful according to the decree in *New York etc.* v. *McCall*, 345 U.S. 346 (349) with regard to administrative agencies and, the second decision after a subsequent hearing was little improvement over the original as the Appeals Council avoided the issue and said Order and Memorandum is pending regarding the objects not accomplished.

EVIDENCE.

The Walter-Logan Bill determined that an agency's decision could be set aside if the "findings of fact are not supported by substantial evidence.

S. 915 HR 6324, 76th Cong. 1st Sess. Sec. 5(a).
Universal etc. v. *Labor etc.*, 340 U.S. 474 (478).

Mr. Justice Frankfurter: "Congress has left no room for doubt as to the kind of scrutiny which a Court of Appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof."

The interlocutory order issued by the Trial Court March 11, 1959 calling for better evidence upon the part of the Secretary as against the plaintiff-appellant has not been answered. See:

Universal etc. v. *National etc.*, 340 U.S. 474 (485).

Under the Administrative Procedure Act, reviewing court must set aside agency findings and conclusions found not to be in accordance with law or unsupported by substantial evidence and, in making such determination court must review whole record.

Administrative P. A. 10(e), Title 5.
N. L. R. B. v. *Hart etc.*, 190 F. 2d 964 (974).

If it appears that the administrative decision is based upon conclusions which are not reasonably reached or which result from improper conclusions of law which were unsupported by evidence, court may and should correct these errors.

Pruitt v. *Fleming*, 182 F. Supp. 159 (161).

Under the Administrative P. A. courts will not interfere with administrative determinations unless upon record proceedings were manifestly unfair or substantial evidence

to support findings is lacking or error of law has been committed or evidence reflects manifest abuse of discretion.

Title 5, Sec. 1, *et seq.*, 1001 in *U. S.* v. *Neelly*, 202 F. 2d 221 (223).

No administrative order shall issue unless it is supported by *substantial* evidence as adequate to support a conclusion.

Administrative P. Act, Title 5, Secs. 5, 7, 10, 1006 and 1009.
McGrath v. *Hughes*, 264 F. 2d 314 (316).
John etc. v. *Fidelity etc.*, 264 F. 2d 374.

Biased interpretation of the unfair report of the Hearing Officer by the Appeals Council wherein appellant is charged with having cashed the benefit check for June 1955 which has been repeatedly denied by appellant was further thwarted by paragraph three of the third defense in the original answer to the original complaint.

Title 28 Rule 41(b). In an action, the Court as trier of the facts may determine them and render judgment against plaintiff or, may decline to render any judgment until the close of all evidence.

Therefore, under the circumstances this Honorable Court will doubtlessly agree that dismissal with prejudice was (in an *ex parte* hearing, especially) premature and unwarranted.

It is error to refuse to reopen a case—if court has excluded exhibits under the best evidence rule.

Corzinne v. *Keith*, 384 Ill. 435.

At both hearings before the Referee and the Hearing Officer appellant asked them if they were not going to examine claimant as to the benefit checks in question, suggesting to said officers that that was standard practice, all to no avail.

Reviewing Court must weigh evidence.

United States v. *West*, 248 F. 2d 934; A 1957 Ill. case.

Function of the reviewing is to ascertain if rulings of the trial court were erroneous.

Evidence may be introduced for the first time in the Appellate Court. Appellant, tried in the United States Court of Appeals and motion denied.

Sec. 10 of the A. P. A., Title 5 of the Code must be read in *pari materia* with Sec. 405(g) of Title 42 of the S. S. Code and any court must set aside any actions, findings and conclusions unsupported by substantial evidence; the standard of evidence to be applied is in:

Julian v. *Folsom*, 160 F. Supp. 747 (749-50).

Obviously, the right to a hearing embraces not only the right to present evidence but a reasonable opportunity to meet the claims of the opposition.

Brotherhood of R. R. T. v. *Swan*, 214 F. 2d 56 (59).

Handwriting—Title 28, Sec. 173. The admitted or proved handwriting of a person shall be admitted for the purpose of comparison to determine genuineness of other handwriting attributed to such person.

Appellant has thus far been frustrated by administrative agencies and the courts in proving forgery of endorsement, this placing appellant in an unjustifiable position.

Evidence not submitted is contrary to:

Ray v. *Social S. Board*, 77 F. Supp. 58 (60).

The whole Act must be construed in order to determine intent of the Congress by considering each section in *pari materia*.

CONCLUSION.

The courts of appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, Title 28, Sec. 1291.

Courts of appeals shall have jurisdiction of appeals from interlocutory orders of District Courts, Title 28, Sec. 1292.

All doubt in construing the Social Security Act should be in favor of beneficiary rather than his exemption.

Ewing v. *McLean*, 189 F. 2d 887.
U. S. v. *Silk etc.*, 331 U.S. 704.
Broderick etc. v. *Squire*, 163 F. 2d 980.

Res judicata precludes the parties from showing what is or may be the truth. *Angel* v. *Bullington*, 330 U.S. 193 (203). That doctrine has no valid application to the facts presently. It is that the doctrine was used by the trial court in facing squarely the real question presented—*viz*: an interlocutory situation commanding the suit at the present time.

Submission of misinformation to the court is inconsistent with "due process."

Townsend v. *Burke*, 334 U.S. 736 (741).

Plaintiff had no opportunity to correct the record.

Depriving one of a rehearing to which he is entitled, constitutes a denial of "due process" in violation of the 5th Amendment of the Constitution of the United States.

The trial court's proceeding to dismiss complaint without any hearing on the merits is in effect an involuntary termination of a suit without a final hearing to dismiss the complaint.

Brown v. *Quinlan Inc.*, 138 F. 2d 228 (229).

The court's order denying plaintiff's motion to set aside judgment entered April 19, 1962 was not timely and hardly within the discretion of the court as the hearing was an *ex parte* affair the plaintiff being temporarily unconscious and otherwise physically unable to attend the hearing or make arrangements to be substituted.

This circumstance this Court will doubtlessly be able among others, to consider.

In considering the prayer for reinstatement of this nationally meritorious cause paintiff-petitioner-appellant cited *Tozer* v. *Charters etc.* 189 F. 2d 242 (244-6) and the well known case in point.

Isbrandsen v. *U. S.*, 211 F. 2d 51 (55).
U. S. v. *Glenn*, 308 U.S. 62.
Burkstaff etc. v. *McKinley*, 308 U.S. 358.

With briefs and additional briefs long since in the files in this case, in the face of the non-appearance of the plaintiff on account of sudden, overnight, severe illness the court could have proceeded with confidence to hold for plaintiff; as an alternative, the court could well have entertained reinstatement of the case pursuant to a trial which would not be in the nature of an *ex parte* proceeding.

Where appellee fails to appear before the court on three several formal court calls, the court may consider the cause on its merits.

County v. *Van Duzen*, 351 Ill. App. 112 (116).

Amendment XIV of the Constitution of the United States Sec. 1 second sentence and third clause state "nor shall any state deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." This same statement is found in Art. II, Sec. 2 of the Constitution of Illinois.

The first time the opposition defaulted in appearance and plaintiff prayed the trial court for judgment on default, the court vociferously showed irritation and annoyance before denying plaintiff's motion.

This is a case wherein the constitutionality of an Act of Congress affecting the public interest is drawn in question *viz.* Sec. 404.512 and 404.512(b) of Regulations, Title 42 of the United States Code.

Generally, a court review of administrative action is limited to the record made before it. The only exception to this rule is where it is claimed that the order under attack will unconstitutionally confiscate property. In such case evidence may be introduced at the time of the hearing on review.

Conroy v. *U. S.*, 200 F. Supp. 10 (15).

Sec. 1009, Title 5, U. S. Code is to be broadly construed so as to grant judicial review of administrative decisions.

U. S. v. *Amorosa*, 167 F. 2d 597 (599).

Sec. 1009(a), Title 5. Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to a judicial review thereof.

District Court's findings induced by an erroneous view of the law is not binding on the United States Court of Appeals.

Billington v. *Prudential etc.*, 254 F. 2d 428 (430) citing *Galena etc.* v. *Schofield*, 218 F. 2d 217.

The referee's findings were fraught with confusion and inaccuracies and, after several promptings the Referee, through his citing *Addison* v. *Hill*, 322 U.S. 607, lost sight of his purpose and inadvertently, in part, demonstrated the mission of claimant's petition.

Due process has not prevailed in this case. "Due process is that kind of procedure * * * which is suitable and proper in the nature of the case and sanctioned by the established customs and usages of the Courts."

Ex parte Wall, 107 U.S. 265 (289).

Plaintiff is not precluded by a judgment from showing that a matter litigated and determined by the judgment should have been determined otherwise.

Cromwell v. *Sac*, 94 U.S. 351.

Dismissal of this case with prejudice in the trial court under the circumstances set forth was premature and unwarranted.

Peardon v. *Chapman*, 169 F. 2d 909 (913) citing
Olsen v. *Muskegon etc.*, 117 F. 2d 163 (165).
Refior v. *Lansing*, 124 F. 2d 440 (444).

In the *Peardon* case the court became annoyed, resultantly the appellant therefore anticipated nothing more drastic than dismissal without prejudice.

Under all the facts, in view of intimidation of dismissal without prejudice and a situation arising less blameworthy than in the first instance, the dismissal with prejudice, was unwarranted. Cases above mentioned were reversed by the U. S. Court of Appeals in re Title 28, Secs. 41 and 41(b).

In the second report made by the Appeals Council to the trial court it did not touch upon Sec. 404.512(b) aforesaid, let alone give its interpretation of said Regulation under Title 42, giving further evidence that the order under date of March 11, 1959 was not completely carried out, yet the trial court was persuaded by the U. S. Attorney that said Memorandum and Order of March 11, 1959 was final, appealable order and, furthermore the U. S.

Court of Appeals supported said trial court in this criticized and premature finding. Therefore the findings of the lower courts were arbitrary and discriminatory.

Gibson v. *Snyder*, 194 F. 2d 329 (333).

The judgment of the United States Court of Appeals in upholding the judgment of the trial court was erroneous and should be reversed and remanded giving the appellant that status wherein he can prove error in the trial court in the five counts listed in his appeal *viz.* failure to recognize interlocutory status of its own order; to permit proof of forgery; to recognize and redress the non-feasance of the Secretary; to correct violations of the United States Code and, to correct fraud practiced upon the trial court.

That the trial court be directed to recognize the constitutionality of the Act of Congress *viz.* Secs. 404.512 and 404.512(b) of Regulations under Title 42 known as the Social Security Act. This is in compliance with paragraph 2(c) of Rule 10 of the Supreme Court of the United States.

The Supreme Court will determine whether there was arbitrary or capricious action as denied appellant due process of law.

People v. *McCall*, 245 U.S. 345.

Respectfully submitted

CHARLES W. JAMIESON
Attorney for Appellant

APPENDIX

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES W. JAMIESON	)	
	)	
vs.	)	Civil No. 58-C-725
	)	
MARION B. FOLSOM now	)	
ARTHUR S. FLEMMING,	)	
Secretary of Health	)	
Education and Welfare	)	

ORDER

Defendant's motion to dismiss plaintiff's petition for review of an administrative decision of the Secretary of Health, Education and Welfare is *granted*. Accordingly, IT IS ORDERED that the action be, and hereby is, dismissed.

Campbell

Date: April 19, 1962

A True Copy Teste
Elbert A. Wagner, Jr.
Clerk
By *Dorothy Aldridge*
Deputy Clerk
April 5, 1963

EXHIBIT B

In the

United States Court of Appeals

For the Seventh Circuit

No. 13798 SEPTEMBER TERM, 1962—JANUARY SESSION, 1963

CHARLES W. JAMIESON,
Plaintiff-Appellant,

v.

MARION B. FOLSOM now ANTHONY J. CELEBREZZE, Secretary of Health, Education and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 11, 1963

Before HASTINGS, *Chief Judge*, and KNOCH and KILEY, *Circuit Judges.*

KNOCH, *Circuit Judge.* Plaintiff, Charles W. Jamieson, filed a complaint with the United States District Court seeking review of a decision made by the Appeals Council of the Social Security Administration.

In his answer, the defendant (herein sometimes called the "Secretary") stated that plaintiff was receiving benefits under § 202(a) of the Social Security Act, Title 42 U. S. C. § 402(a); that he was paid monthly benefits of

$88.50 for the first six months of 1955; "that because plaintiff had such earnings in 1955 as to subject each of the monthly benefits otherwise payable to him for that year to 'deductions,' under the provisions of the Social Security Act, plaintiff's monthly benefits for the year 1956 were withheld until the amount of the overpayment of $531.00 had been recovered."

On April 16, 1956, the Bureau had addressed a form letter to Mr. Jamieson advising him that the Bureau had charged against his benefits from January 1956, to July 1956 (in the total amount of $619.50), "unreturned checks you received to which you were not entitled" from January 1955, to June 1955 (in the total amount of $531). The Bureau advised plaintiff that his annual report showing earnings of more than $2,080.01, and work for 12 months in that year, required withholding of benefits for all 12 months of that year. Only 6 months' benefits had in fact been withheld. Thus he was overpaid $531.

Section 404(b) of Title 42, U.S.C. provides that there shall be no recovery of such overpayment where the claimant is without fault, and where recovery would defeat the purpose of the statute or would be against equity and good conscience. In this case, the Referee who heard the matter in the office of the Appeals Council of the Bureau found that on all the evidence, plaintiff's total earnings for the first 6 months of 1955 amounted, at least, to $1,320 (or in excess of $1,200) and that he was not without fault in receiving the benefit checks for the first months of 1955. As plaintiff was found not to be without fault, the Council held that recovery of the sum paid should not be waived.

On March 11, 1959, the District Court reversed the decision of the Secretary as to "waiver" under § 404(b), and remanded the cause to the Secretary for further hearing. The District Judge specifically held that the referee's deci-

sion that plaintiff was "not without fault" was not supported by substantial evidence and was therefore arbitrary and capricious under Title 5, U. S. C. § 1009(e).

This was a final appealable order. Under Title 42, U. S. C. § 405(g) the District Court could have affirmed the decision of the Secretary, modified, or reversed it, with or without remanding it for further hearing. *Hobby v. Hodges*, 10 Cir., 1954, 215 F. 2d 754, 759. No appeal was taken from the District Court's order of March 11, 1959. The District Court lost jurisdiction of the matter after, in effect, issuing a mandate for a new trial. After the entry of this final order, plaintiff, nevertheless, filed a number of motions with the District Court, all of which were denied as moot on December 23, 1959, as the hearing ordered on March 11, 1959, had been held. The District Court also "dismissed" the case at that time.

It is not disputed that the decision after rehearing on remand was rendered on March 31, 1960. It was allegedly received by plaintiff on April 2, 1960. His time in which to seek review of that decision expired, at the latest, June 1, 1960, pursuant to § 405(g) which provides that review of the Secretary's decision may be obtained by civil action commenced within 60 days of the mailing of the notice of that decision.

On November 13, 1961, plaintiff filed his petition for review of the Secretary's decision of March 31, 1960, which reached the plaintiff on April 2, 1960. Motion to dismiss the petition of November 13, 1961, as (*inter alia*) untimely filed, was granted on April 19, 1962, and motion of plaintiff to set that order of dismissal aside was denied. This appeal followed.

The right here sought to be enforced is a statutory right which is limited by the provisions of the creating statute as to the time in which it may be asserted. As plaintiff did not file his action to review the Secretary's decision of March 31, 1960, within the 60 days provided by the statute, his right to such review ceased to exist. *Bomer* v. *Ribicoff*, 6 Cir., 1962, 304 F. 2d 427, 429.

The judgment of the District Court must be affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.